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No. 88-37

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners challenge the constitutionality of Section 223(b) of the Communications Act of 1934 as it was in effect prior to its most recent amendment.

1. In 1983, Congress enacted Section 223(b) of the Communications Act of 1934 to protect children from the harmful effects of sexually explicit telephone messages, commonly known as "dial-a-porn." See Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8, 97 Stat. 1469. As originally enacted, Section 223(b) made it illegal to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent" (47 U.S.C. (Supp. III)

223(b)(1)). The section provided, however, that it would be a defense to prosecution if a provider of such communications restricted access to adults in accordance with "procedures that the [Federal Communications] Commission shall prescribe by regulation" (47 U.S.C. (Supp. III) 223(b)(2)).[1]

After the Second Circuit remanded two prior versions of the Commission's regulations implementing the statute (see *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113 (1984) (Pet. App. A121-A140); *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 855 (1986) (Pet. App. A70-A89)), the Commission adopted a rule that established a defense for those dial-a-porn providers that either (1) required credit-card payment or access codes before transmission of a recorded message, or (2) scrambled their messages so that they would be unintelligible to a caller without a descrambler. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd 2714, 2722-2723 (1987) (Pet. App. A28-A64). Petitioners, a group of affiliated dial-a-porn providers, filed a petition for review of the Commission's regulation and challenged the constitutionality of the underlying statute on the grounds that it was overbroad and vague, violated due process, created an illegal national standard of obscenity, and unconstitutionally delegated power to the Commission (Pet. App. A18-A20).

The court of appeals upheld the Commission's regulation as a "feasible and effective way to serve" the "compelling government interest" in "protect[ing] minors from

[1] Section 223(b) provided for criminal penalties of up to $50,000 in fines and six months' imprisonment for each violation (47 U.S.C. (Supp. III) 223(b)(1)(B)), and authorized the Federal Communications Commission (Commission) to initiate proceedings to impose civil fines for violations of the law (47 U.S.C. (Supp. III) 223(b)(4)).

obscene speech" (Pet. App. A16). The court, however, limited the statute's reach to telephone messages that are obscene but not indecent. The court of appeals reasoned that the statute would be unconstitutional if "the term 'indecent' [were] to be given meaning other than * * * obscenity" (Pet. App. A25). The court rejected petitioners' remaining challenges to the statute, as so interpreted. The court ruled that Section 223(b) "does not create [a] * * * national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials * * *, or the broadcasting of obscene messages" (Pet. App. A26 (citations omitted)). The court further held that it would be "premature" to determine whether the Commission's authority to punish violations of Section 223(b) is consistent with due process. And the court held that the statute's delegation of authority to the Commission to promulgate regulations "is accompanied by sufficient guidelines and standards for the exercise of the authority" (Pet. App. A27).

2. Soon after the court of appeals' decision, Congress revisited the problem of preventing access by children to dial-a-porn. Congress reviewed the Commission's experience in trying to craft regulations and concluded that it was "not technologically possible to keep this information out of the hands of young people." 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). Congress determined that the only effective solution to prevent access by children is to prohibit sexually explicit telephone messages altogether. See *id.* at H1691 (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("if a so-called technological solution to the access

of our children to dial-a-porn had been available, I, of course, would have supported it"). Accordingly, in April 1988, Congress amended Section 223(b) to prohibit dial-a-porn altogether by eliminating the Commission's authority to establish defenses to prosecution. See Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424.[2] Section 223(b), as it now reads, bans entirely the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication."

3. Petitioners renew their constitutional challenge to the superseded version of Section 223(b). The recent amendment to Section 223(b), however, eliminated the legal effect of the Commission's regulation that the court of appeals reviewed. And petitioners have never been prosecuted or otherwise sanctioned under the superseded version of Section 223(b). Thus, petitioners' request for judicial review of the Commission's rule, which was promulgated under the superseded version of Section 223(b), is now moot. The Court should reject petitioners' suggestion (Pet. 12) to render what would be, in the context of this case, an "advisory opinion[ ] on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). See *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

Some of the constitutional issues raised by petitioners are also raised by petitioner Sable Communications of California, Inc., in a different lawsuit challenging the current version of Section 223(b). In that case, the District

[2] The House and Senate passed the amendments on April 19 and 20, 1988. See 134 Cong. Rec. H1836 (daily ed. Apr. 19, 1988); *id.* at S4386 (daily ed. Apr. 20, 1988). The President signed the new law on April 28, 1988 (24 Weekly Comp. Pres. Doc. 540 (May 2, 1988)) and it became effective on July 1, 1988.

Court for the Central District of California upheld the constitutionality of the current version of Section 223(b) insofar as it prohibits obscene telephone communications.[3] On September 26, 1988, Sable filed a jurisdictional statement seeking review of that decision. See *Sable Communications of Calif., Inc.* v. *FCC*, No. 88-515. Sable's appeal, not this case, is the proper vehicle for considering Congress's ban on obscene dial-a-porn messages now contained in Section 223(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] The California district court enjoined the enforcement of Section 223(b) insofar as it prohibits *indecent* commercial telephone communications. The government has filed a jurisdictional statement asking for plenary review of that aspect of the court's decisions. See *FCC* v. *Sable Communications of Calif., Inc.*, No. 88-525 (jurisdictional statement filed Sept. 26, 1988).

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